STATE OF MICHIGAN

COURT OF APPEALS

ALLIED MECHANICAL SERVICES, INC., Plaintiff-Appellee,	UNPUBLISHED March 22, 2007
v	No. 266165 Ottawa Circuit Court
DR&W ENGINEERING & DESIGN, INC., d/b/a DR&W ENGINEERING & DESIGN, STEVEN D. RADEMAKER, CHARLES A. WAHL, and TIMOTHY B. DALY, Defendants-Appellants.	LC No. 03-047725-CK

Before: O'Connell, P.J., and Murray and Davis, JJ.

PER CURIAM.

In this construction contract dispute, defendants appeal as of right the judgment entered in plaintiff's favor following a bench trial. We affirm.

During its existence, DR&W Engineering & Design, Inc. (DRW) frequently acted as a construction manager on engineering projects for Pfizer, Inc. (Pfizer). In 2002, DRW contracted with Pfizer to create "as-built" drawings of Pfizer's compressed air piping system. DRW engaged Allied Mechanical Services, Inc. (AMS) to complete the leak-testing portion of the project. At the completion of the project, Pfizer paid DRW the full contract price, but defendants refused to pay AMS because of a dispute over the amount owed to AMS. The trial court concluded that defendants violated the BTFA by withholding payment from AMS and entered judgment against defendants jointly and severally.

Defendants first argue that the builders' trust fund act (BTFA), MCL 570.151 *et seq.*, is inapplicable to the contract at issue, and the trial court erroneously denied them summary disposition on this basis. Defendants argue that the leak testing conducted by AMS did not constitute "building construction" within the meaning of the BTFA. We disagree.

A grant or denial of summary disposition is reviewed de novo on the basis of the entire record to determine if the moving party is entitled to judgment as a matter of law. *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999). When reviewing a motion under MCR 2.116(C)(10), which tests the factual sufficiency of the complaint, we consider all evidence submitted by the parties in the light most favorable to the non-moving party and grant summary disposition only where the evidence fails to establish a genuine issue regarding any material fact.

Id., 120. The proper interpretation of a statute is likewise reviewed de novo, with the primary purpose of discerning the intent of the Legislature, which is generally best discerned from the language of the statute itself. *Neal v Wilkes*, 470 Mich 661, 664-665; 685 NW2d 648 (2004).

The purpose of the BTFA is to protect people from fraud in the building construction industry. *DiPonio Constr Co v Rosati Masonry Co*, 246 Mich App 43, 49; 631 NW2d 59 (2001). In relevant part, building contract funds paid to a contractor or subcontractor "in the building construction industry" and "for building construction purposes" are considered trust funds held by the recipient for the benefit of the recipient's subcontractors, laborers, or materialmen. MCL 570.151. It further provides that

> Any contractor or subcontractor engaged in the building construction business, who, with intent to defraud, shall retain or use the proceeds or any part therefor, of any payment made to him, for any other purpose than to first pay laborers, subcontractors and materialmen, engaged by him to perform labor or furnish material for the specific improvement, shall be guilty of a felony . . . . [MCL 570.152].

The BTFA does not define "building," "construction," or "improvement." Defendants argue that these terms should be given their plain and ordinary meanings, *Robertson v DaimlerChrysler Corp*, 465 Mich 732, 748; 641 NW2d 567 (2002), under which the leak testing performed by AMS would not constitute "building" or "construction," rendering the BTFA inapplicable.

However, statutes which relate to the same subject or share a common purpose are in pari materia and must be read together as one law, even if they contain no reference to one another and were enacted on different dates. *State Treasurer v Schuster*, 456 Mich 408, 417; 572 NW2d 628 (1998). Statutes relate to the same subject if they relate to the same person or thing or the same class of persons or things. *Houghton Lake Area Tourism & Convention Bureau v Wood*, 255 Mich App 127, 146; 662 NW2d 758 (2003). We agree with plaintiff that the Construction Lien Act (CLA), MCL 570.1101 *et seq.*, is in pari materia with the BTFA. The purpose of the CLA is "'to protect the interests of contractors, workers, and suppliers through construction liens, while protecting owners from excessive costs.'" *Erb Lumber, Inc v Gidley*, 234 Mich App 387, 393-394; 594 NW2d 81 (1999), quoting *Vugterveen Systems, Inc v Olde Millpond Corp*, 454 Mich 119, 121; 560 NW2d 43 (1997). Both pertain to the construction industry and are intended to protect the interests of those involved in the industry. We will therefore apply the definition of "improvement" found in the CLA.

The CLA defines "improvement" as:

> the result of labor or material provided by a contractor, subcontractor, supplier, or laborer, including, but not limited to, surveying, engineering and architectural planning, construction management, clearing, demolishing, excavating, filling, building, erecting, constructing, altering, repairing, ornamenting, landscaping, paving, leasing equipment, or installing or affixing a fixture or material, pursuant to a contract. [MCL 570.1104(7).]

The entire project at issue here involved a survey of the existing system, testing the system for leaks, identifying and tagging those leaks, and creating a drawing of the system displaying the

location of those leaks; Pfizer would then repair the leaks. The leak testing performed by AMS was therefore an essential step in the repair of Pfizer's piping system, and DRW acted as the project's construction manager. Surveys, construction management, and repair all fall within the nonexclusive list of acts constituting "improvement" under the CLA. We conclude that the work performed by AMS constituted "improvement" under the BTFA.

Defendants next argue that the trial court erred when it found a prima facie violation of the BTFA. We disagree. We review the factual findings of a trial court sitting without a jury for clear error. MCR 2.613(C).

To establish a claim under the BTFA, a plaintiff must show: (1) that the defendant is a contractor or subcontractor engaged in the building construction industry, (2) that the defendant was paid for labor or materials provided on a construction project, (3) that the defendant retained or used those funds, or any part of those funds, (4) that the funds were retained, with intent to defraud, for any purpose other than to first pay laborers, subcontractors, and materialmen, and (5) that the laborers, subcontractors and materialmen were engaged by the defendant to perform labor or furnish material for the specific construction project. *HA Smith Lumber & Hardware Co v Decina*, 258 Mich App 419, 426; 670 NW2d 729 (2003), vac'd in part on other grds 471 Mich 925 (2004). Defendants argue that AMS provided no evidence that defendants used the funds received from Pfizer for anything other than paying laborers. However, intent to defraud is evidenced by "the appropriation by a contractor . . . of any moneys paid to him for building operations before the payment by him of all moneys due or so to become due laborers, subcontractors, materialmen or others entitled to payment." MCL 570.153.

"[A] reasonable inference of appropriation arises from the payment of construction funds to a contractor and the subsequent failure of the contractor to pay laborers, subcontractors, materialmen, or others entitled to payment." *People v Whipple*, 202 Mich App 428, 435; 509 NW2d 837 (1993). In *Whipple*, this Court held that the prosecutor in a criminal matter need not "prove 'what the defendant did with the money' if a reasonable inference of appropriation is present." *Id.*, 436. However, the same inference is appropriate in a civil action. *HA Smith Lumber*, *supra* at 426-427. Because defendants received payment for the compressed air project and subsequently refused to pay AMS, an inference of appropriation arises. Defendants presented no evidence rebutting this inference, so their failure to pay AMS is evidence of intent to defraud. MCL 570.153. Therefore, we find that AMS successfully established a prima facie violation of the BTFA.[1]

Finally, defendants argue that the trial court erred in finding the individual defendants personally liable to AMS. We disagree. Officers of a corporation may be held individually liable when they personally cause their corporation to act unlawfully or when they participate in a tortious or criminal act, whether on behalf of themselves or of the corporation. *People v Brown*, 239 Mich App 735, 739-740; 610 NW2d 234 (2000). The elements set forth for a civil

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[1] *James Lumber Co, Inc v J & S Construction, Inc*, 107 Mich App 793, 795-796; 309 NW2d 925 (1981) is not binding on this Court, whereas *Whipple* and *HA Smith Lumber* are. MCR 7.215(J)(1).

action under the BTFA require that the defendant retained or used the funds received from a construction project for any purpose other than paying laborers, subcontractors, and materialmen. MCL 750.152; *HA Smith Lumber*, *supra* at 426. Similarly, for individual liability to attach to an officer, the officer must have personally misappropriated funds after receipt by the corporation. *Brown*, *supra* at 743-744. DRW had three shareholders, all of whom mutually decided not to pay AMS after DRW received payment from Pfizer. Therefore, because the individual defendants caused DRW to violate the BTFA, the trial court did not err in finding them personally liable. *Id*.; *Whipple*, *supra* at 435. The BTFA directly provides for liability for corporate officers, so we have no need to consider independently the doctrine of "piercing the corporate veil."

Affirmed.

/s/ Peter D. O'Connell
/s/ Alton T. Davis